

DEC 15 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MERTEN,

Plaintiff - Appellant,

V.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant - Appellee.

No. 05-35237

D.C. No. CV-03-06306-AJB

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted December 8, 2005^{**}
Portland, Oregon

Before: D.W. NELSON and O'SCANNLAIN, Circuit Judges, and BURNS^{***},
District Judge.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

Michael Merten appeals the district court's judgment affirming the final decision of the Commissioner of Social Security that Merten was not entitled to Supplemental Security Income (SSI) payments or Social Security disability insurance benefits. We review *de novo*, *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir. 2005), and we affirm.

The Administrative Law Judge (ALJ) resolved conflicting medical evidence from two treating physicians, without improperly rejecting either physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

Similarly, the ALJ did not improperly reject Merten's testimony regarding his subjective symptoms. Rather, he credited Merten's testimony regarding his impairments and the extent of his pain, and he provided "clear and convincing reasons" for rejecting Merten's statements concerning his ability to work. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

We need not address whether, under the Medical Vocational Guidelines, Merten may have become disabled as of February 23, 2003, his fifty-fifth birthday. 20 C.F.R. Pt. 404, Subpt. P., App. 2, § 202.00(c). Our review of Merten's claim is limited to the Commissioner's final decision, which covers the period from September 11, 2000, through December 17, 2001. Since that decision was

supported by substantial evidence and free of legal error, Merten's proper recourse is to file a new application for SSI and disability benefits alleging disability as of February 23, 2003.

AFFIRMED.